A

Persida Paros (M) Sdn Bhd v Janagi a/p Sinnasamy

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2164–09 OF 2012
HAMID SULTAN, BADARIAH SAHAMID AND PRASAD ABRAHAM JJCA
29 SEPTEMBER 2015

C

Land Law — Possession — Recovery of — Sale and purchase agreement and power of attorney executed for sale of land owned by respondent — Respondent commenced action for return of land sold to appellant — Whether respondent aware of content of power of attorney — Whether trial judge weighed interest of parties in right perspective — Whether there was miscarriage of justice

D

The appellant and the respondent had entered into a sale and purchase agreement ('the SPA') of a land ('the said land') situated in Petaling Jaya owned by the respondent for an agreed sum of RM88,000. The appellant had paid the purchase price of the said land and subsequently the power of attorney ('PA') which had been executed by the respondent was released to the appellant. The appellant had invested considerable amount of time and money on the said land to convert the land from agriculture land to industrial land. The appellant had also built two factories on the said land. The respondent then commenced an action against the appellant to get back the said land and pleaded non est factum. In essence, the respondent submitted that she was unaware of the contents of the PA and was not bound by the PA. On the other hand, the appellant submitted that the respondent knew of the said transaction and was a party and had executed documents for the assignment to go through. The appellant counterclaimed against the respondent for the payment of the price of the said land in accordance with current market value as well as the costs for the construction of the factories. The trial court allowed the respondent's claim and declared that the SPA had been terminated; and dismissed the appellant's counterclaim, hence this appeal.

E

F

G

H

Held:

(1) Based on the factual matrix of the case, the learned trial judge had not weighed the relative interest of the parties in the right perspective and had failed to take a common sense approach in determining the claim of the parties. There was a substantial miscarriage of justice and this was a fit and proper case for retrial pursuant to s 71 of the Courts of Judicature Act 1964 (see paras 2–3 & 21).

I

[Bahasa Malaysia summary

Perayu dan responden telah memasuki perjanjian jual beli ('PJB') tanah ('tanah tersebut') yang terletak di Petaling Jaya yang dimiliki oleh responden bagi jumlah yang dipersetujui sebanyak RM88,000. Perayu telah membayar harga belian tanah tersebut dan kemudiannya surat kuasa wakil ('SKW') yang mana telah dilaksanakan oleh responden diberikan kepada perayu. Perayu telah melabur sejumlah besar masa dan wang ke atas tanah tersebut dan menukar tanah daripada tanah pertanian kepada tanah perindustrian. Perayu telah membina dua kilang atas tanah tersebut. Responden kemudiannya memulakan tindakan terhadap perayu untuk mendapatkan balik tanah tersebut dan memplid *non est factum*. Pada dasarnya, responden berhujah bahawa dia tidak tahu mengenai isi kandungan PJB tersebut dan tidak terikat oleh PJB tersebut. Sebaliknya, perayu berhujah bahawa responden mengetahui mengenai transaksi tersebut dan adalah satu pihak dan telah melaksanakan dokumen-dokumen untuk penugasan tersebut diluluskan. Perayu menuntut balas terhadap responden bagi bayaran harga tanah tersebut mengikut nilai pasaran semasa dan juga kos bagi pembinaan kilang-kilang tersebut. Mahkamah perbicaraan membenarkan tuntutan responden dan mengisytiharkan bahawa PJB telah ditamatkan; dan menolak tuntutan balas perayu, maka rayuan ini.

Diputuskan:

(1) Berdasarkan matriks fakta kes, hakim bicara yang bijaksana tidak mempertimbangkan kepentingan pihak dalam perspektif yang betul dan telah gagal untuk membuat pendekatan akal dalam menentukan tuntutan pihak-pihak. Terdapat ketidakadilan yang substansial dan ini adalah kes yang layak dan sesuai bagi perbicaraan semula berikutan s 71 Akta Mahkamah Kehakiman 1964 (lihat perenggan 2–3 & 21).]

Notes

For cases on recovery of possession, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 4260–4276.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 CLJ 1, FC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)

Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors [2015] 3 MLJ 791, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 71

Appeal from: Civil Suit No 22–203 of 2001 (High Court, Shah Alam)

DP Vijandran (SR Raman with him) (Raman & Co) for the appellant.
S Thilaga (S Thilaga) for the respondent.

Hamid Sultan JCA:

[1] The appellant ('the third defendant') appeals against the decision of the learned High Court judge who allowed the respondent ('the plaintiff') land owner to get back the property which she had sold.

[2] What is important to note is that the plaintiff had sold a bare agriculture land for RM88,000 but by the order of court, is getting back the land which has been converted to industrial land with the approval of state authority and also one or two factories built on the land with no compensation ordered to the persons who are in occupation of the land, notwithstanding the value of the land and the improvement thereon is worth a few million ringgit. The learned trial judge had not weighed the relative interest of the parties in the right perspective and had failed to take a common sense approach in determining the claim of the parties (see *Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors* [2015] 3 MLJ 791; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1).

[3] At the first instance, after having read the submission and the judgment of the trial court, we took the view that there was a substantial miscarriage of justice and this was a fit and proper case for retrial.

[4] My learned sister Badariah bt Sahamid JCA and my learned brother Prasad Sandosham Abraham JCA have read the judgment and approved the same. This is our judgment.

BRIEF FACTS

[5] The plaintiff had by sale and purchase agreement dated 28 January 1994 sold the land in dispute to the first defendant for the sum of RM88,000. The second defendant was then the solicitor in respect of the sale and purchase agreement. The plaintiff had received a deposit sum of RM8,800. The original title was handed over to the second defendant to obtain consent from the state authority to sell the property. The state authority refused consent and by a letter dated 29 July 1995, the plaintiff instructed the second defendant to cancel the

sale and purchase agreement. However, the second defendant informed the plaintiff that the first defendant was still desirous of purchasing the land and was entitled to do so pursuant to cl 8(a) of the said agreement.

[6] In a letter dated 7 May 1996, the second defendant had informed that the first defendant had assigned all his rights and liability to the said agreement to the third defendant. The third defendant denied the plaintiff's claim and relied wholly on the sale and purchase agreement in which he had acted on the agreed arrangement and spent his savings on the said land based on documents executed by the plaintiff. It is evident that there are two factories on the said land. Consent to transfer has been obtained and the said land has been converted to industrial use and the current market value is said to be about 4.6m Ringgit.

[7] The power of attorney ('PA') which has been executed by the plaintiff was kept in escrow by Ranjit Singh Partners as solicitors pending the payment of the balance of the purchase price. Further, the plaintiff admitted signing the following documents: (i) Form 14A ('D17'); (ii) Form PDS 15 ('D18'). The PA was duly executed, stamped and registered and was not revoked or set aside. Sometime later the balance of the purchase price was paid by the third defendant. The solicitor, Ranjit Singh, then released the power of attorney to the third defendant. The third defendant contends that the power of attorney ('PA') has not been revoked and still subsists and the plaintiff is bound by the PA.

[8] On the strength of the PA, the third defendant is said to have invested considerable amount of time and money to improve the value of the land as follows:

(a) applied for and obtained consent;

(b) converted from agricultural use to industrial and paid RM99,848.50 in premium;

(c) built two factories on the land; and

(d) till today is spending about RM5,000 a month to guard the factories and to maintain the up keep of the access road and drains.

[9] The third defendant had relied on the power of attorney in para 22(c) and para 36 of their defence as follows:

> Para 22(c)
>
> Plaintif juga tanpa sebarang paksaan telah tandatangan 'Irrevocable Power of Attorney' dan memberi kuasa kepada defendan ketiga untuk bertindak sebagai Pemegang Kuasa terhadap tanah tersebut.

Para 36

Oleh kerana semua transaksi berkenaan harta tersebut dilakukan dengan izin dan pengetahuan Plaintif, Plaintif sendiri telah tandatangan semua dokumen berkaitan pindah milik harta tersebut. Plaintif dengan sengaja enggan terima balik harga belian harta tersebut, dan Plaintif juga telah memberi kuasa kepada Defendan Ketiga melalui 'Irrevocable Power of Attorney', Plaintif kini terhalang dan menuntut milikan kosong tanah tersebut dari Defendan Ketiga.

[10] The plaintiff replied via paras 20–25 of her reply as follows:

20. Plaintif menafikan perenggan 22 Penyata Pembelaan Terpinda Defendan Ketiga dan meletakkan beban bukti sepenuhnya ke atas Defendan Ketiga.

21. Plaintif jarang melawat tanahnya kerana ianya diliputi tumbuhan lebat dan Plaintif tidak mempu untuk membersihkan tanahnya untuk apa-apa tujuan ekonomi.

22. Plaintif tidak pernah berurusan dengan Defendan Ketiga dan tidak pernah memberi kebenaran kepada Defendan Ketiga untuk membina dua (2) buah gudang/kilang di tanah tersebut.

23. Plaintif telah menandatangani banyak dokumen yang disediakan oleh Defendan Kedua dengan kepercayaan penuh bahawa dokumen-dokumen tersebut adalah perlu untuk urusan jual beli tanah tersebut kepada Defendan Pertama.

24. Plaintif tidak boleh membaca dan bertutur dalam Bahasa Inggeris, hanya berupaya bertutur dalam Bahasa Tamil da nisi kandungan dokumen-dokumen yang ditandatangani oleh Plaintif tidak pernah diterangkan kepadanya.

25. Plaintif akan menyandarkan diri kepada prisip non-est factum terhadap saranan Defendan Ketiga bahawa Plaintif telah menandatangani dokumen rasmi dan dengan demikian adalah terikat dengannya.

[11] The plaintiff did not deny signing the PA. Instead the plaintiff pleaded non est factum. The plaintiff says she is unaware of the contents of the PA and is not bound by the PA.

[12] When the third defendant paid the balance of the purchase price, the plaintiff rejected and returned the payment. The plaintiff argues that the PA is not valid and she is not bound by it.

[13] The issue was considered by the learned trial judge in her judgment as follows:

49. Over and above, I find it ludicrous to believe that the Plaintiff and her son would agree to the terms of the alleged oral agreement as alleged by DW4. DW4 said that it was because the Plaintiff had agreed to the terms that she had executed an irrevocable Power of Attorney in favour of the Third Defendant. There are issues on the irrevocable Power of Attorney ('PA'). The Plaintiff said she had no knowledge of the PA. DW3 and DW4 said the contents of the PA were explained in the Tamil Language to the Plaintiff by both Selvaraju and Tamil. Again, these persons were not

called to testify. So, the allegation of DW3 and DW4 is not substantiated. It cannot be denied that the PA being one of the crucial issues in this case, it is therefore a material fact and the calling of Tamil and Selvaraju becomes crucial. The non-calling, hence, entitles me to draw an adverse inference against the Second and Third Defendants on this point. A further issue raised by the Third Defendant on the PA is that the Plaintiff had acknowledged her signature on the said document (exhibit D19) and this, Third Defendant contends, can only mean that the Plaintiff knew what was signing. I do not share that view. It must be appreciated that the Plaintiff, having completed only basic Tamil primary education, cannot be expected to understand the contents of the PA, particularly because it is admitted that the contents had to be explained to her in the Tamil language by Selvaraja and Tamil. I have already said the two persons who did the so-called explanation were not called to testify. The facts also show that the Plaintiff was taken and asked to sign some documents whilst at the stamp office, in the absence of her son. There is no evidence, in my view, which had been adduced to remove all suspicions that the Plaintiff was conscious and had full knowledge of the contents of the documents to which she had affixed her signature.

[14] In considering the evidence it must be noted that there were no questions as to credibility of witnesses raised by the learned judge. This was essentially because Her Ladyship only heard some of the witnesses as she took over from another judge. She did not hear the plaintiff giving evidence.

[15] In consequence, the appellant proposes to consider the question purely on contemporaneous documents and the logical inferences to be drawn from the facts established.

[16] The appellant as regards the validity of the PA submit as follows:

(a) The PA was duly executed by the plaintiff;

(b) She does not deny that she signed the PA;

(c) Her signature was duly attested.

(d) PW1 had admitted signing the Irrevocable Power of Attorney and identified her signature in the original document. The Power of Attorney is marked as D21, the Plaintiff's signature is marked as D19 and a copy of the Title can be found at page 158–160 J2.

(e) Although the Plaintiff went through some prevarication as to her signature, she finally admitted that she did sign the PA.

(f) With respect we submit that the plaintiff cannot raise this plea. This plea is not something that can be simply raised to conveniently escape legal liability. The courts are aware that the sanctity of contract will be meaningless if everyone who is faced with a contract she has signed blithely says that she did not know what she was signing.

(g) The locus classicus on non est factum is *Saunders v Anglia Building Society*

[1970] 3 All ER 961, where the House of Lords held:

> A person who signs the document and parts with it so that it may come into other hands, has the responsibility, that of a normal man of prudence, to take care what he signs, which if neglected, prevents him from denying his liability under the document according to its tenor ...

(h) This principle has been applied extensively locally. We crave leave to refer to a number of local cases which have applied and amplified this principle. And relies on the cases of: (i) *Lin Wen-chih & Anor v Mycom Bhd* [2014] 3 MLJ 691; (ii) *Rabiah bt Ani v Samsi bin Hj Hasim* [2011] 7 MLJ 225; (iii) *AWC Berhad v Point-Euro Malaysia SB* [2012] MLJU 474; (iv) *Omega Securities Sdn Bhd v Dato' Hamzah* [2011] 8 MLJ 12; (v) *Halimah bt Saaod v Azmi bin Che Ros* [2009] 7 MLJ 69; (vi) *Soo Boon Siong v Saw Fatt Seong* [2005] 5 MLJ 129.

[17] It is the case of the third defendant that the plaintiff knew of the said transaction and was a party and had executed documents for the assignment to go through. However, it is the finding of the learned High Court judge that the plaintiff did not know what she was signing and accepted the story.

[18] We do not wish to dwell on the issues, as we have ordered a re-trial, save to set out what the learned counsel for the appellant had to say in the submission in brief, as follows:

> 1. The thrust of our appeal is based on basic contract law and contractual obligations and the attendant principles as to powers of attorney. With respect, we submit that Her Ladyship in the High Court took a casual view of contractual obligations and the power of attorney ('PA') granted by the plaintiff. Her Ladyship adopted the stance that the assertion of non est factum by the plaintiff will suffice to excuse the plaintiff from contractual obligations and the PA voluntarily entered into by her and evinced by her own signature.
>
> 2. In this appeal, we will focus on delineating the constituents of the contract between the plaintiff and the third defendant. We will then set out the binding nature of that contract and the power of attorney granted by the Plaintiff. Finally, we will show why the plaintiff cannot raise the concept of non est factum to escape her obligations under the contract and power of attorney.
>
> 3. The third defendant, Persida Paros (M) Sdn Bhd, is a company formed in Malaysia pursuant to Companies Act 1965. DW4, Peter Mariappan a/p Subramaniam ('DW4') is the company's managing director.
>
> 4. Sometime in October 1993, one of the plaintiff's relative known as Selvarajoo, informed DW4 that the plaintiff intends to sell her land. DW4, after some research became interested to purchase the land and a meeting was held in the office of Messrs K Ranjit Singh & Partners, the solicitors who are the second defendant.

5. The meeting was attended by the Plaintiff ('PW1'), her relative Selvarajoo, Mariappan ('DW4'), Ranjit Singh ('DW3') and one Tamilarasan, a clerk at Ranjit's office. The sale of the land by the plaintiff to the third defendant was discussed at the meeting and it was agreed as follows:

(a) The plaintiff gave an option to DW4 for the third defendant to purchase the land for RM88,000 or alternatively to find some other buyer to purchase the land at minimum price of RM88,000.

(b) In the event, the third defendant managed to find a purchaser to buy the land at any higher price, the third defendant was to be entitled to keep the difference.

6. Pursuant to this agreement, the third defendant paid RM8,800 to the plaintiff being 10% of the agreed purchase price.

7. In consideration thereof and also pursuant to this oral agreement the plaintiff executed an irrevocable power of attorney ('PA') in favour of the third defendant.

8. The plaintiff has given evidence that she did indeed sign the PA (exh D19) and that together with that PA she had deposited the Original title with the second defendant, Ranjit Singh and Partners. She also admitted receiving the RM8,800.

...

30. As we have shown earlier, the PA is a valid document signed by the plaintiff according to her own evidence. It has been duly attested, stamped and registered. It has not been revoked.

31. There is no question of fraud or misrepresentation. These are not even raised on the pleadings. There was no allusion to fraud by the learned judge.

32. There is also evidence that on the strength of the oral agreement and the PA, the third defendant had acted to his detriment by expending time and money to improve the value of the land which at the time of the oral agreement was just jungle.

33. The plaintiff was apparently aware of the work done by the third defendant on the land.

34. We also refer to the following:

(a) PW2, the son, was also fully aware about the buildings on the land.

(b) D3 applied for consent and obtained it on 31 December 1999.

(c) D3 was given approval to convert from agriculture to industry on 16 November 2007.

(d) D3 paid RM99,848.50 in premium.

(e) Photos of buildings.

(f) Valuation Report.

35. The plea of non est factum was obviously an after-thought devised to allow the plaintiff to avoid her legal obligations.

36. There is really no evidence whatsoever on which the plea of non est factum can stand.

37. The only objection raised against the PA was the plea of non est factum. Since that plea is a non-starter, we submit that the PA stands as valid and subsisting.

38. A valid PA cannot be avoided in collateral proceedings and cannot be revoked obliquely. And relies on the cases of: (i) *Haji Bakti Amuali v Jimmy Wong Sze Phin & Ors* [1994] 3 CLJ 741; (ii) *Mohamed Modu bin Mohamed & Anor v Hassan bin Kadir & Ors* [2001] 4 MLJ 292.

[19] There were many other issues that the appellant had raised, but we do not wish to repeat. The learned trial judge gave orders in favour of the plaintiff as follows:

(a) against the first defendant, a declaration that the sale and purchase agreement dated 28 February 1994 executed between the plaintiff and first defendant has been terminated and the plaintiff duly refund the deposit sum of RM8,800 free of interest to the first defendant;

(b) against the second defendant, damages to be assessed for breach of trust and fiduciary duties;

(c) an order that the second defendant deliver the original issue document of title HS (M) 872, PT No 313, Mukim Bukit Raja, Daerah Petaling Jaya, Negeri Selangor Darul Ehsan to the plaintiff forthwith subject to the refund of deposit as stated in prayer (a) above;

(d) against the first and third defendants, a declaration that the deed of assignment dated 20 April 1996 executed between the first and third defendants in in valid;

(e) a declaration against the third defendant, that the third defendant has no interest whatsoever in the said land;

(f) an order that the third defendant is to vacate the said land immediately and is to surrender vacant possession of the said land to the plaintiff; and

(g) the costs of this action be duly taxed and paid by the defendants to the plaintiff.

[20] The counterclaim of the third defendant was dismissed. The said orders, the third defendant was seeking were as follows:

(a) Harga tanah tersebut berdasarkan harga pasaran terkini dibayar kepada Defendan Ketiga.

(b) kos membina dua buah kilang atas tanah tersebut sebanyak RM1,200,000;

(c) kos peguam untuk mengendalikan semua perjanjian yang dimasukki diantara Plaintiff, Defendan Pertama dan Defendan Ketiga;

(d) gantirugi atas kemungkiran janji pihak Plaintif;

(e) kos tindakan ini. A

[21] After much consideration to the factual matrix of the case for the reasons stated in the early part of the judgment, we were of the considered view that this is a fit and proper case to order for retrial, pursuant to s 71 of the Courts of Judicature Act 1964 ('the CJA 1964') which reads as follows: B

71 New trial.

(1) Except as hereinafter provided the Court of Appeal shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction. C

(2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the Court of Appeal that the wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties. D

(3) A new trial may be ordered on any question without interfering with the finding or decision of the court below upon any other question. E

[22] For reasons stated above, we allowed the appeal with the following orders and/or directions:

(a) the judgments against the third defendant is set aside; F

(b) the order refusing the counterclaim of the third defendant is set aside;

(c) the matter to be retried with liberty for the parties to amend the pleadings inclusive of the counterclaim;

(d) the plaintiff to pay costs of RM10,000 to the respondent; and G

(e) deposit refunded.

[23] We have also recorded a consent term by the parties to say that the monies that have been paid to the plaintiff solicitors on terms as stakeholders as per the order of the High Court to remain and no further payments by the third defendant to be made until further order of the High Court. H

Order accordingly.

I

Reported by Dzulqarnain Ab Fatar